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Supreme Court, U.S.
FILED
OCT 6 - 2004
OFFICE OF THE CLERK

No. 04-242

In The Supreme Court of the United States

ESTER P. EMMERMAN and
RONALD Z. EMMERMAN,

Petitioners,

v.

THE CITY OF HIGHLAND PARK, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW RESTATED

Is there an unconstitutional taking of property when a municipality denies a variance for development on a substandard lot based upon a fact-based application of its zoning ordinance, which ordinance contains a presumptively valid provision that prohibits separate development of contiguous, commonly-owned non-conforming lots when those contiguous lots can be aggregated and developed as a conforming lot?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

In 1968, Petitioners bought a residential property consisting of a house and backyard. Although the property included two platted lots, neither lot would have met the minimum lot size requirement of the zoning district in which the property was located. Pet. App. A-3. At the time Petitioners purchased the property, and at all times since, a municipal ordinance (the "Ordinance") has prohibited the separate development of a substandard lot when the substandard lot is contiguous to a commonly owned lot with which it can be developed. Pet. App. A-3. Thus, at the time Petitioners bought the property they could not have separately developed either substandard lot independently of the other. Consequently, the purchase price Petitioners paid was for the entire property, unapportioned between the lots.

For more than 30 years, Petitioners continued to use and enjoy the entire property as their residence. In 2001, Petitioners applied for a zoning variation to build a new house on that portion of the property that was their backyard. The new house would be in addition to the house that Petitioners already owned and occupied. After a factual hearing, the municipal zoning board applied the long-standing Ordinance, and denied the requested variation.

Although Petitioners assert that application of the Ordinance constituted an unconstitutional taking of their property, in fact the Ordinance does not prevent them from using any part of their property, nor does it deprive them of all economically viable use of their property. This

type of ordinance is, moreover, a common zoning regulation used by municipalities throughout the country to prevent separate development on substandard lots, the legitimacy of which has been repeatedly upheld by numerous state courts.

A. Factual Background

Respondents discuss Petitioners' factual omissions and mischaracterizations of the facts in their Reasons For Denying the Petition.

B. Judicial Proceedings

Petitioners' claims have been rejected at every stage below. Their petition for a variance was denied by the zoning board after a lengthy hearing. The denial was upheld by the Illinois circuit court and the Illinois appellate court. The circuit court dismissed Petitioners' takings claim, and was affirmed by the appellate court. The Illinois Supreme Court denied a petition for leave to appeal.

The decision of the Illinois appellate court is consistent with the takings analysis of this Court, the federal circuit courts, and the courts of other states. Petitioners rely primarily on the dissenting opinion below. But, as discussed in the Reasons For Denying the Petition, the dissent ignored a number of factual considerations discussed by the majority, and the dissent arrived at a relevant parcel by a means that this Court has repeatedly rejected.

REASONS FOR DENYING THE PETITION

Petitioners' assertion that the decision below was unfair and unjust is baseless. The denial of Petitioners' takings claim was fully consistent with all of the legal and equitable principles of takings analysis. Indeed, in the

realm of regulatory takings cases, where a diminution of value may still not constitute a taking (*see, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 131 (1978)) (the Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking' ")), Petitioners here have suffered no injury at all. They still have every bit of property interest they purchased, and they are not, in any event, precluded from developing any portion of their property. Moreover, the zoning regulation they seek to challenge is patently legitimate.

Petitioners' contention that there is a conflict among the circuits and among the state courts is also baseless. Petitioners point out that in some takings cases the courts have aggregated commonly owned contiguous properties as the relevant parcel for analysis and in other cases they have not. Petitioners' error is their presumption that there must be a *per se* rule that requires the result to be always one or always the other. In fact, the courts have consistently made a case-specific factual analysis, which inherently will produce a relevant parcel determined by the particular facts of the case. There is no conflict below.

Moreover, even if this Court were disposed to further address the global issue Petitioners have raised, the instant case would not be an appropriate vehicle for that purpose. This case does not involve the one-strand-in-a-bundle-of-rights issues that often arise in cases involving vertical or temporal relevant parcel analyses. This case also does not present typical horizontal relevant parcel issues that would be of general significance in regulatory takings cases. Here there has been no denial of the use of any part of Petitioners' property, and the Ordinance Petitioners challenge is a widely used zoning regulation that has been repeatedly upheld.

For all of these reasons, the petition for certiorari should be denied.

I. THE DECISION BELOW IS NEITHER UNFAIR NOR UNJUST

Petitioners have lost nothing. First, Petitioners are not prohibited from continuing to use or develop their property. Second, they have exactly the same property rights today as when they bought the property. The proposition "that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 130. Here, Petitioners have not even lost "a property interest that they heretofore had believed was available for development." They have everything they had at the time they purchased the property.

In 1968, Petitioners bought a residential property ("Property") in the City of Highland Park, Illinois ("City"), with a house on the front and a large backyard. Although the Property was platted as two lots, it was owned, used and sold to Petitioners as a single parcel. Petitioners bought the Property for a single price of $45,000, there being no allocation between the two platted lots. Pet. App. A-19. There was an obvious reason for treating the Property as a single parcel. The zoning district in which it was located had, at that time, a minimum buildable lot size of 40,000 square feet. Pet. App. A-3. The two contiguous lots Petitioners purchased were each 15,415 square feet (*id.*), so neither lot, by itself, could be a lawful, conforming, lot on which a single family residence could be built. The City's zoning code, then as now, prohibited the separation of commonly-owned contiguous lots to create separate, isolated, non-conforming lots. *Id.* Thus, at the time Petitioners bought the Property, they had no basis to believe that the rear, backyard lot was a separable "property interest . . . available for development," nor could they have had any investment expectations with respect to the

rear lot as a separate buildable property.[1] There has never been any prohibition of construction on the rear lot, so long as such construction is within the zoning for the Property as a whole – the only prohibition is against separating the rear lot to create an isolated non-conforming lot – indeed, in this case to create not one, but two, substandard lots.

For more than 30 years Petitioners utilized the entire Property as their residence. Since 1970, the minimum lot size in Petitioners' zoning district has been 20,000 square feet. Pet. App. A-4.

In 2001, Petitioners sought a variance to allow them to build a second house on the Property – that is, a separate house on the non-conforming rear lot of the Property. *Id.* At the public hearing on the variation request, Petitioners admitted that the Property that they had bought for $45,000 was now worth $800,000 to $1 million. Pet. App. A-8. The City's Zoning Board of Appeals ("ZBA") found that Petitioners had failed to make the required showing to justify a variance that would exempt them from the existing zoning and allow them to create two substandard lots. Pet. App. A-4-5. The ZBA also found that, under the factual circumstances, denial of the variance would not deny Petitioners either the economic value of their property or their reasonable investment expectations. Pet. App. A-8-10.

Petitioners then brought this action.

Petitioners point out that an individual, isolated, non-conforming lot that fails to meet the minimum lot size requirement will ordinarily be treated as buildable despite that fact that it is a substandard lot. From this,

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[1] The fact that a regulation exists at the time a property is purchased does not preclude a takings claim, but is relevant to the purchaser's investment expectations. *See, e.g., Palazzolo v. Rhode Island*, 533 U.S. 606, 633-35 (2001) (O'Connor, J., concurring).

Petitioners leap to the conclusion that there is no constitutional justification for a zoning ordinance that precludes the separate development of a substandard lot that is commonly owned with a contiguous lot. A moment's thought demonstrates the dramatic difference between the two situations. A zoning district may, due to historical quirks in the way in which lots were platted over time, contain some isolated, separately-owned lots that do not meet the minimum lot size. An exception to the district's minimum lot size zoning to allow construction on such non-conforming lots may be necessary to prevent those isolated non-conforming lots from being forever non-buildable and largely worthless. This compromise from the desired zoning in the district is unfortunate from a public interest standpoint, but arguably necessary. However, there is no such justification to deviate from applying consistent zoning throughout a zoning district when a non-conforming lot is contiguous to, and in common ownership with, another lot. Because such a non-conforming lot can be built upon in conjunction with the contiguous, commonly owned lot, the problem of an isolated, unbuildable, lot does not exist and there is no reason to make an exception to the desired zoning in the district. The public interest objective is to have as few separate substandard lots as possible. There is certainly no justification for allowing the creation of *new*, isolated, non-conforming lots. This is particularly true when, as here, the zoning requirement existed when the property was purchased and the buyer could have had no investment expectations regarding that aspect of the property.

As discussed more fully in Section III.B.2 below, zoning ordinances designed to deal with this specific issue by prohibiting the separation of contiguous commonly owned non-conforming lots are a common zoning regulation throughout the country, their legitimacy having been repeatedly upheld by various state courts as an appropriate exercise of the police power.

Petitioners omit important facts and mischaracterize others in an effort to create an image of injustice. They ignore the existence of separate, distinct, zoning districts, and, despite dropping their equal protection claim, they erroneously imply that they have been singled out and discriminated against. Petitioners state on pages 3 and 4 of their petition that "[m]any of the lots in the neighborhood are the same size or smaller than [Petitioners' lot], and so are also deemed to be non-conforming. Nevertheless, the City has allowed all to be residentially developed." Petitioners repeat on page 23 of their petition that, "[o]ver time, the City has agreed to the residential development of these undersized lots, [Petitioners'] vacant lot being the only exception." As the basis for these statements, Petitioners cite to the dissenting opinion below at Pet. App. A-37. But that is not what is said there. Rather, the dissent merely recites Petitioners' allegations that the majority of lots "in the vicinity of Sherwood Avenue" (on which Petitioners' lot is located) are no larger than Petitioners' lot and that many lots within 100 feet and within 250 feet of Petitioners' lot are the same size as or smaller than Petitioners' lot. The dissent also notes Petitioners' allegation that their lot is "the only vacant non-conforming lot in the area." This simply does not support Petitioners' foregoing statements that development has been allowed on many non-conforming lots or Petitioners' innuendo that they have been discriminated against.

Petitioners' misstatements and omissions are misleading in two respects. First, both Petitioners and the dissent below omit the fact that Sherwood Avenue, on which Petitioners' Property is located, is the dividing line between two of the City's zoning districts, and that the R-6 zoning district across the street has a much smaller minimum lot size than the R-4 zoning district in which Petitioners' lot is located. Pet. App. A-4. As the majority opinion below observes, Petitioners erroneously ignore the different zoning classifications and presume that the smaller lots in the different zoning district should be treated as comparable to

Petitioners' lot. Pet. App. A-23. It is both self-evident and judicially well-established that the boundaries of a zoning district must be drawn somewhere; if a property owner had the right to demand the same minimum lot size zoning as that in a different zoning district across the street from his property there would be no enforceable boundaries to zoning districts. *See, e.g.,* 2 Young *Anderson's American Law of Zoning* (4th ed. 1996) § 9.09 at 134-35 (hereinafter "*American Law of Zoning*").

Petitioners' innuendo of discrimination is also erroneous in that their allegation that Petitioners' lot is "the only non-conforming vacant lot in the area" does not indicate discrimination. It says nothing about how many non-conforming lots exist in Petitioners' zoning district. Obviously, the smaller lots in the other zoning district are not non-conforming as to Petitioners' minimum lot size requirement, because they are subject to a smaller minimum lot size requirement. Petitioners' allegation of being the only non-conforming vacant lot in the area also says nothing about whether any built-upon non-conforming lots may have been, unlike Petitioners' lot, isolated non-conforming lots, or whether they were built before the current lot size requirements were enacted.

Petitioners also assert that the decision below "allowed the City to impose an open space servitude on the Petitioners' vacant lot without paying for it." Pet. at 26. In truth, however, Petitioners knew at the time they bought their Property that they were buying land in a zoning district that had large minimum lot areas. Several adjacent zoning districts had smaller minimum lot areas. In denying the Petitioners' request for a variance, the ZBA found, *inter alia*, that the larger lots sizes in Petitioners' zoning district provided important open space relief from the more congested adjacent zoning districts. Pet. App. A-4, A-24. This Court has long recognized the legitimacy of

such open space considerations in zoning regulations. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) ("The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open space areas"). Moreover, there is no taking without compensation because the contiguous ownership provision merely enforces the zoning district's minimum lot size requirement while not prohibiting the development of any part of the Property.

In what is perhaps Petitioners' most audacious argument, they assert that treating their substandard lot as the separate, relevant parcel involves "little risk . . . [of] bestowing a windfall of compensation." Pet. 25. It is undisputed that Petitioners could not, at the time they bought the Property, have separately developed the rear, substandard lot under the applicable zoning. Pet. App. A-9. Consequently, they could not have had reasonable investment expectations regarding the separate development of that lot apart from the Property as a whole, nor does the record reflect that they paid a price for the Property that would reflect any such investment expectations. Investment expectations are a significant factor to be considered in takings analysis. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 326 fn. 23 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 634-36 (2001) (O'Connor, J., concurring). Although this factor is not alone determinative (*id.*), it surely undermines Petitioners' argument here that there is "little risk" of them receiving windfall compensation.[2]

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[2] Petitioners' suggestion that there will be no windfall compensation to themselves because owners of isolated non-conforming lots are generally allowed to build on them is misplaced. As discussed above, an exception to the minimum lot size requirement may be necessary for

(Continued on following page)

In summary, Petitioners' entire Property is useable and it is just as useable today as it was the day Petitioners purchased it. There is nothing unjust about the denial of Petitioners' takings claim.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS NOR AMONG THE STATE COURTS

Petitioners assert that there is a conflict below with respect to how the relevant parcel of property is to be determined for purposes of analyzing whether a regulatory zoning restraint constitutes an unconstitutional taking of property without just compensation. Contrary to Petitioners' assertions, the cases they cite present no conflict among the federal circuits, nor among the state courts, nor with the prior rulings of this Court. Indeed, they demonstrate a remarkable consistency. Petitioners' argument that a conflict exists is based on the mistaken premise that there must be a *per se* rule that will either *always* result in commonly owned properties being aggregated as the relevant parcel or *always* result in commonly owned properties not being aggregated. In fact, at least with regard to the horizontal boundaries of the parcel, no such *per se* rule is possible, nor even desirable.[3] This Court's decisions have repeatedly called for case-specific factual determinations in regulatory takings cases. The federal and state courts below have consistently determined the

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isolated substandard lots. The different legal status of such property is known to buyers of such property and causes their investment expectations to be different from buyers of contiguous substandard lots, who know that they cannot separately develop their substandard lot.

[3] As one author stated, "[i]nitially, this Article was undertaken with the avowed purpose of developing a bright-line rule to help solve the denominator problem. However, the process of research and writing has demonstrated that this is not a desirable result." Lisker *Regulatory Takings and the Denominator Problem* 27 Rutgers L.J. 663 (Spring 1996).

relevant parcel in takings cases based on an examination of the facts of the specific case, applying guidelines articulated by this Court.

A. This Court Has Articulated Guidelines That the Courts Below Have Consistently Followed

1. Regulatory Taking Cases, In Contrast to Physical Taking Cases, Generally Require Ad Hoc Factual Examinations

This Court has consistently distinguished between the application of *per se* rules to physical takings cases and the case-specific factual examinations required in regulatory takings cases:

> Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries," *Penn Central,* 438 U.S. at 124, designed to allow "careful examination and weighing of all the relevant circumstances." *Palazzolo v. Rhode Island,* 533 U.S. 606, 636 (O'Connor, J., concurring).

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 322 (2002).

The Court in *Tahoe* further stated that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner [citation omitted], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Id.* In contrast, the Court noted, government regulations such as those that ban certain private uses of a portion of the owner's property or forbid the private use of certain airspace, do not

constitute a categorical taking. "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and the economic effects of government actions." *Id.* at 323 (citing *Yee v. Escondido*, 503 U.S. 519, 523 (1992)).

There are two rather narrow exceptions in which a regulatory taking may be deemed a categorical taking without the usual case-specific inquiry: (1) when the regulation compels the owner to suffer a physical "invasion" of his property, and (2) when the regulation denies all beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). The first exception, physical invasion, which is akin to a physical taking, does not require the determination of a relevant parcel. The second exception, the denial of all beneficial use, does require a determination of a relevant parcel and therefore can avoid a case-specific examination of the property only when the relevant parcel is undisputed (as in *Lucas*) or, at least, patently indisputable.

Thus, absent these exceptional circumstances, in the normal regulatory taking case there must be a case-specific examination of the facts. *See Tahoe*, 535 U.S. at 332 ("the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact-specific inquiry").

2. The Identification of the Relevant Parcel Is Inherently a Part of the Case-Specific Factual Examination

This Court has held that the "test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property," thus requiring a determination of the

relevant parcel of property, sometimes referred to as the "denominator" of the fraction. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 497 (1987). The Court has made clear that there is no *per se* rule defining the relevant parcel simply as the property interest subject to the regulatory restriction: "defining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [restriction] would become a total ban * * * We have consistently rejected such an approach to the 'denominator' question." *Tahoe*, 535 U.S. at 331.[4]

Rather, "in regulatory takings cases we must focus on 'the parcel as a whole.'" *Id.* Takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. . . . [T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Central*, 438 U.S. at 130-31.

The Court's reference to the "parcel as a whole" and the "property in its entirety" does not, of course, resolve the specific factual question of what constitutes the whole parcel or the entire property, but it is part of the guidance the Court has provided for the factual inquiry. Amplifying on these phrases, the Court has frequently stated that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its

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[4] *See also Concrete Pipe & Products of Cal., Inc. v. Constructioner Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question").

entirety." *Keystone Bituminous*, 480 U.S. at 497 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)).

More significantly, the case-specific factual determination of the relevant parcel must be made with reference to the issues upon which a claim of taking is analyzed. The Court stated in *Penn Central*, 438 U.S. at 124:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. [citation omitted] So, too, is the character of the governmental action.

Accord Kaiser Aetna v. U.S., 444 U.S. 164, 175 (1979); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

Recently, this Court stated in *Tahoe* that "[o]ur polestar . . . remains the principles set forth in *Penn Central* and the other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." 535 U.S. at 336.

Lower courts have determined the relevant parcel by making case-specific findings that identify a relevant parcel that is most appropriate under the particular facts within the context of their examination of the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action.

B. The Circuit Court Cases Cited By Petitioners Are Not In Conflict

Petitioners mistakenly argue that with regard to the determination of the relevant parcel there is a conflict between two Federal Circuit cases, on the one hand, and a decision of the District of Columbia Circuit, on the other. *Palm Beach Isles Associates v. U.S.*, 208 F.3d 1374 (Fed. Cir. 2000); *Loveladies Harbor, Inc. v. U.S.*, 28 F.3d 1171 (Fed. Cir. 1994); *District Intown Properties Limited Partnership v. District of Columbia*, 198 F.3d 874 (DC Cir. 1999), *cert. denied*, 531 U.S. 812 (2000). The two Federal Circuit cases declined to treat certain properties initially purchased in common ownership as a single parcel whereas the District of Columbia Circuit did treat still-commonly-owned contiguous properties as a single parcel. There is no conflict in these decisions unless one assumes, contrary to common sense, that there must be a *per se* rule requiring aggregation or non-aggregation in every case, regardless of the specific facts involved. A case-specific factual analysis inherently presumes that some cases will properly result in aggregation and others not, as the facts dictate. The proper test of consistency is not whether aggregation does or does not occur in every case, but whether the courts have applied a consistent, reasoned analysis to decide the issue. In fact, they have.

The two Federal Circuit cases Petitioner cites, *Loveladies* and *Palm Beach Isles*, involved similar factual situations. In *Loveladies*, the plaintiff developer had purchased 250 acres in 1958 and thereafter developed or sold 199 of them. Subsequently, in 1972, section 404 of the Clean Water Act was enacted. Fifty of the remaining undeveloped 51 acres were under water. Under the Act plaintiff would require permits from the State of New Jersey and the Army Corps of Engineers in order to create landfill so as to develop that acreage. Plaintiff eventually agreed to a compromise with New Jersey under which only 12.5 of the 51 acres could be developed. The Corps of

Engineers, however, refused a permit. Plaintiff brought a taking claim.

The *Loveladies* court rejected plaintiff's argument that there should be a bright-line rule that the relevant parcel should, *ipso facto*, be deemed to be limited to the parcel for which the permit was applied. Rather, the court held that "[o]ur precedent displays a flexible approach, designed to account for factual nuances." 28 F.3d at 1181. The court further stated that "[t]hese factual nuances include consideration of the timing of the transfers in light of the developing regulatory environment." *Id.* Examining the factual background, the court concluded that the 199 acres developed or sold before the regulatory restrictions existed should not be included in the relevant parcel for takings analysis. The court further concluded that the 38.5 acres which plaintiff had committed to the State of New Jersey in exchange for its approval to develop 12.5 acres also should not be included because it would be of no further value to the plaintiff. The court thus concluded that the remaining 12.5 acres was the relevant parcel, and the court accepted the trial court's finding that without a permit its value was de minimus.

The Federal Circuit again made a similar case-specific factual analysis in *Palm Beach Isles*. The plaintiff there had bought 311.7 acres in 1956, of which 261 acres was "upland" property on one side of a road, whereas the remaining 50.7 acre parcel on the other side consisted of 1.4 acres of shoreline wetlands and 49.3 acres of submerged land. The two parcels were subject to different zoning. In 1968 the plaintiff sold the 261 acres. Twenty years later, in 1988, the plaintiff applied to the State of Florida and the Corps of Engineers for permits to dredge and fill the submerged acreage. The Corps denied a permit and plaintiff brought a taking claim. Proceeding to determine the relevant parcel, the court noted that, "[a]s we said in *Loveladies Harbor*, '[o]ur precedent

displays a flexible approach, designed to account for factual nuances.'" 208 F.3d at 1381. The court observed that plaintiff had never planned to develop the two parcels as a single unit, that the purchase and sale of the 261 acres occurred before the environmental restrictions of the Clean Water Act were enacted in 1972, and that the development of the 261 acres "was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed." *Id.* at 1381. The court thus held that the relevant parcel was the 50.7 acres of wetlands and submerged lakebed. On rehearing, applying further case-specific factual analysis, the court concluded that within the 50.7 acres, the 1.4 acres of non-submerged wetlands was not subject to a navigational servitude and should be separately analyzed. 231 F.3d 1354, 1364 (Fed. Cir. 2000).

Petitioner erroneously asserts that the District of Columbia Circuit's decision in *District Intown Properties* is in conflict with the foregoing Federal Circuit decisions in *Palm Beach Isles* and *Loveladies*. In fact, all three decisions applied similar reasoning. In *District Intown Properties* the plaintiff had purchased in 1961 a property in the District of Columbia consisting of an apartment building and adjacent landscaped lawns. Unlike *Palm Beach Isles* and *Loveladies*, in *District Intown Properties*, the plaintiff ("District Intown") made no immediate effort to develop, sell or separate any part of the property. Rather, 27 years later, in 1988, District Intown subdivided the property into nine lots, one being the apartment building and the other eight being portions of the adjacent lawn. District Intown sought a permit to build townhouses on each of the eight "lawn" lots. Because the property was across the street from the National Zoo, any proposed development plans were subject to review by the District of Columbia Commission on Fine Arts pursuant to the Shipstead-Luce Act, which had been enacted in the 1930s to protect various

public buildings and parks. The Commission recommended against the permit and it was denied. District Intown brought a taking claim.

District Intown argued that the relevant parcel for purposes of determining the regulatory impact on its property should be limited to the eight "lawn" parcels for which a permit was sought and should not include its contiguous existing apartment building. The plaintiff in *Loveladies* had similarly argued that the relevant parcel should be limited to the property for which the permit was requested, but the Federal Circuit rejected that argument in favor of a case-specific factual analysis. The District of Columbia Circuit did the same thing in *District Intown Properties*. 198 F.3d at 880, *et seq.*

In *District Intown Properties* the district court had concluded that the relevant parcel included the apartment lot as well as the lawn lots. On appeal, the circuit court agreed, acknowledging with approval the case-specific factual analysis the district court had applied:

> The District Court used several factors to determine the relevant parcel: the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot. [citation omitted] An analysis focused on these factors is eminently sound and it mirrors the approach taken by other courts in regulatory takings cases. [citations omitted]

198 F.3d at 880. The court further noted that the apartment and lawn properties were spatially and functionally contiguous and had been treated by District Intown as a single indivisible property for more than 25 years.

The court in *District Intown Properties* expressly addressed the decision in *Loveladies*, noting, *inter alia*, *Loveladies* emphasis on a "flexible approach, designed to account for factual nuances." 198 F.3d at 881. The court

concluded that in light of the factual circumstances of each case, the cases were consistent. *Id.*

Another Federal Circuit case, not cited by Petitioners, further undermines their argument that there is a conflict between the Federal and District of Columbia Circuits. *See Forest Properties, Inc. v. U.S.*, 177 F.3d 1360 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 951 (1999). The *Forest Properties* case belies Petitioners' argument that the Federal Circuit prohibits aggregation in determining the relevant parcel. Rather, *Forest Properties* applied the same case-specific factual analysis as *Loveladies* and *Palm Beach Isles* (and *District Intown Properties*, as well), stating that "[o]ur precedent displays a flexible approach, designed to account for factual nuances." *Id.* at 1365. The court said that this "requires courts to focus on the expectations of the claimant with regard to the property," and "[w]here the developer treats legally separate parcels as a single economic unit, together they may constitute the relevant parcel." *Id.* Here, the court said, it was understood from the beginning that "the two portions would be developed as a single unit." *Id.*

Other lower federal courts have applied a nearly identical analysis. In *Ciampitti v. United States*, 22 Cl.Ct. 310, 318-319 (1991), for example, the Court of Federal Claims discussed the determination of the relevant parcel in similar terms of case-specific factual analysis:

> Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of the remaining lands, and no doubt many others, would enter the calculus.

In summary, the Federal Circuit and the District of Columbia Circuit have both determined the relevant parcel by a nearly identical case-specific factual analysis "designed to account for factual nuances." Petitioners have failed to demonstrate that there is any conflict among the circuits.

C. The State Court Cases Cited By Petitioner Are Not In Conflict

Petitioners' assertion that there is a conflict among the state courts with respect to the relevant parcel in takings cases is based on the same erroneous premise. That is, Petitioners again mistakenly assume that there is a conflict if all the cases do not uniformly result in either aggregation or non-aggregation of related properties, when in fact no such result should be expected from a case-specific factual analysis. The state court cases, like those of this Court and the federal circuit courts, routinely apply just such a case-specific factual analysis, as reflected in the cases Petitioners have cited.

For example, citing to the various factual considerations set forth in *Ciampitti, supra*, the Supreme Court of Michigan has stated that "[d]etermining the size of the denominator parcel is inherently a factual inquiry." *K & K Construction, Inc. v. Department of Natural Resources*, 575 N.W.2d 531, 536 (Mich. 1998). A similar factual analysis was made in *Karam v. Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998). There the court noted that although contiguous commonly-owned acreage is often treated as a single parcel for takings analysis, factual examination may result in treating the property as separate parcels. The court cited various cases involving large tracts of acreage that had been segmented into smaller parcels for development at different times, where "either because of the configuration of the property or its history, the divided parcels [were] considered as separate and distinct entities or units." 705 A.2d at 1228. The court discussed various factual issues in the case before it and concluded that, "*[r]ecognizing the fact-sensitive question before us*, we are convinced that the adjoining upland and riparian lands must be considered a single property unit." *Id.* (Emphasis added.)

The Supreme Court of Ohio case cited by Petitioners adopted the same approach:

> Although contiguous tracts of property are typically considered as a single relevant parcel for purposes of a takings analysis, factual nuances may dictate a more flexible approach. . . . These factual nuances may include the claimant's investment-backed expectations.

State ex. Rel. R.T.G., Inc. v. State of Ohio, 780 N.E.2d 998, 1009 (Ohio 2002) (citations omitted). The California cases cited by Petitioners also applied the same case-specific factual analysis to determine the relevant parcel in takings cases. In *Twain Harte Associates, Ltd. v. County of Tuolumne*, 265 Cal.Rptr. 737, 745 (Cal. App. 1990), the court stated that "it seems obvious the question of whether two related parcels will be treated as one . . . [is] necessarily bound up in the 'ad hoc factual' [citation omitted] evaluation which constitutes the test for determining a 'taking.'" *See also Aptos Seascape Corp. v. County of Santa Cruz*, 188 Cal.Rptr. 191, 197 (Cal. App. 1982) (adopting as the "appropriate" approach that determining whether there are two separate parcels for taking purposes is a question of fact). The Supreme Court of Colorado, in *Animas Valley Sand and Gravel, Inc. v. Board of County Commissioners*, 38 P.3d 59 (Colo. 2001), examined the impact of a county land use plan that regulated all of the plaintiff's property but restricted the use of only part of it. The court rejected the plaintiff's argument that the relevant parcel was only the restricted portion: "Were we to accept [plaintiff's] position that a court should evaluate the effect of a regulation with respect to only one segment of the parcel, virtually any land use regulation would effect a taking if the landowner defined the relevant parcel small enough." *Id.* at 69.[5]

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[5] The Oregon cases add nothing. *See Coast Range Conifers, LLC v. State of Oregon*, 76 P.3d 1148, 1157-58 (Or. App. 2003) (Oregon Supreme Court has "never explained" relevant parcel rationale, and Oregon does not presume same interpretations of federal and state constitutions).

Petitioners assert that the "decision below deepens the confusion among the state courts." Pet. at 21. In fact, the Illinois Court of Appeals followed the exact same, factually oriented reasoning of the federal and state courts discussed above. The court stated:

> [I]n *District Intown Properties*, the court applied such factors as the degree of contiguity, the dates of acquisition, the extent to which the parcel had been treated as a single unit, and the extent to which the restricted lots benefitted the unregulated lot. [citation omitted]

Pet. App. at A-18. The court then examined the facts of the case within that context. *Id.* at A-19. The court noted that Petitioners' complaint indicated that they had purchased the Property as a single unit at one time, and that the two lots had been in contiguous ownership since Petitioners bought them in 1968. Pet. App. A-19. The court further noted that Petitioners had admitted before the ZBA that they could not have purchased the lots separately because of the Ordinance, which was in effect at the time the Property was purchased, that they paid a single price of $45,000 for the entire Property, and that "the lot they now assert should be treated separately could not legally have been built upon as a separate lot either at the time they purchased the Property or at present." *Id.*

Examining the Ordinance, the court first found it to be facially valid. The court observed that Petitioners did not dispute that the City has legitimate interests at stake, in the form of minimum lot area requirements. Pet. App. A-26. The court stated that, "[m]oreover, we find that a sufficient nexus exists between reducing density and providing the contiguous ownership regulation to prevent construction on lots of substandard size." *Id.* After finding the Ordinance facially valid, the court, in a detailed analysis, held that the Ordinance was valid as applied to Petitioners. Pet. App. A-21-27.

Petitioners, in contrast, rely on the dissenting opinion below, which is clearly contrary to the decisions of this Court.

The dissent simply concluded that the "proper approach is to recognize, as does the City's zoning ordinance, the lot line dividing plaintiffs' property and to define the relevant property for takings purposes simply as the [substandard] lot." Pet. App. A-36 (O'Malley, J., dissenting). However, if there is one thing that this Court has made absolutely clear regarding the relevant parcel, it is that the relevant parcel is not simply the restricted area defined by the regulation:

> [D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every [restriction] would become a total ban. . . .

Tahoe, 535 U.S. at 331.

Petitioners are incorrect in asserting that there is a conflict among the state courts.

III. THE PRESENT CASE IS NOT, IN ANY EVENT, AN APPROPRIATE CASE FOR THIS COURT TO FURTHER ADDRESS ISSUES RELATING TO THE DETERMINATION OF THE RELEVANT PARCEL IN TAKINGS CASES

The circumstances of this case would not offer an appropriate vehicle for the Court to provide significant guidance with regard to the determination of the relevant parcel in takings cases.

A. The Present Case Does Not Involve Vertical or Temporal Restrictions on Uses

Members of the Court have sometimes suggested a concern about the proper analysis to be used in determining the relevant parcel when a regulation restricts, in a vertical or temporal context, one strand of a "bundle of rights," such as subsurface mining rights, *Lucas*, 505 U.S. at 1016, fn. 7 (SCALIA, J., in dicta characterizing *Pennsylvania Coal* and *Keystone Bituminous Coal* as "inconsistent pronouncements by the Court"); air rights of landmarked buildings, *Penn*

Central, 438 U.S. at 138 (REHNQUIST, C.J., and STEVENS, J., dissenting); and temporary restrictions on construction, *Tahoe*, 535 U.S. at 343 (REHNQUIST, C.J., SCALIA, J., and THOMAS, J., dissenting).

The present case involves none of these circumstances. To the extent that it involves any issue of relevant parcel at all, it relates only to the horizontal boundaries of the parcel. But even in that regard, this case does not provide a framework for the Court to offer useful guidance to the courts below.

B. The Present Case Does Not Involve Circumstances Typical of Those In Which There Is a Question of Whether to Aggregate Commonly Owned Parcels

Petitioners assert that if the non-conforming, but separately platted, rear lot within the Property were deemed to be the relevant parcel for takings analysis, then the denial of a variance to build on that lot would constitute a taking. But, as the following discussion shows, there is no justification for making such a determination, and the circumstances involved here do not provide a framework within which to offer guidance to lower courts in the general context of how a relevant parcel should be determined.

1. There Is No Prohibition Here of the Use of *Any* Part of Petitioners' Property

In a typical regulatory takings case there is either a partial limitation on the use of all of the property, such as a limitation to only residential use, or a complete restriction on some limited portion of the property, such as a set-back area within which construction is prohibited. In contrast, in the present case the Ordinance does not preclude the development of *any* part of Petitioners' Property. They may build anywhere on the Property – on the front lot or on the back lot or on both lots together. The only restriction is that because

each lot standing alone would be substandard and nonconforming with regard to the minimum lot size, they must utilize the two lots together and cannot build separately and independently on each substandard lot.

Petitioners contend that because they already have a house on the front lot of the Property, the denial of a variance to build on the rear lot prevents their use of the rear lot. However, it is Petitioners themselves who have elected to use the Property as they have and not build on the rear lot. As stated above, Petitioners are free to build on any part of the Property, including the rear lot, and they have elected to have a house on the front lot. They could tear down that house and build a new house anywhere on the Property, including the rear lot, or they could, within zoning requirements, expand their existing house onto the rear lot as well as the front lot. But there is nothing that precludes construction on any part of their Property.

2. The Prohibition on Separating Commonly-Owned Contiguous Lots to Create New, Isolated, Substandard Lots Is a Well-Established Zoning Principle

The present case is also different from the usual takings case in which there is a relevant parcel issue because the regulation involved here is such an integral part of accepted zoning practice. In the usual regulatory takings case in which the relevant parcel comes into play, the use of certain property is restricted and the court must examine numerous factual considerations regarding the contiguous property owned by the plaintiffs to determine how much of it should logically be included in analyzing the takings claim. In contrast, in the present case the Petitioners are challenging a zoning regulation that is in widespread use, and the legitimacy of which has been repeatedly upheld by courts, across the country.

Respondents recognize that the mere fact that a particular regulation is a legitimate exercise of the police power does

not automatically shield the regulation from a taking challenge. *See Lucas*, 505 U.S. at 1020, *et seq.* (lower court's finding of legitimate exercise of police power did not preclude takings claim where regulation eliminated all economically viable use of the property). Nevertheless, the Court has repeatedly emphasized that the purpose of the regulation is a significant factor in determining whether there has been a taking. *Penn Central*, 438 U.S. at 124 ("[T]he character of the governmental action is a factor." A taking is less likely "when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good"); *Agins*, 447 U.S. at 261 ("The specific zoning regulations at issue are exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate"); *Tahoe*, 535 U.S. at 337 ("moratoria like [the regulations involved here] are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy"); *Keystone Bituminous*, 480 U.S. at 485 ("the government action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare"); *Palozzolo*, 533 U.S. at 617 (factors that must be considered include "the character of the government action").

Minimum lot area regulations have long been a staple of municipal zoning schemes and have been recognized as a proper exercise of local zoning power. *See generally American Law of Zoning* § 9.64 at 310-13. These regulations serve a municipality's legitimate interest in maintaining uniformity and symmetry in the development of the municipality or a particular neighborhood. *See, e.g., id.* at 310 ("Reasonable area restrictions control density, reduce congestion, and prevent undue concentration of population.")

Minimum lot area regulations are sometimes waived when they pose the risk of saddling land owners with isolated, substandard lots that cannot be developed. *American*

Law of Zoning § 9.66. In the present case, the Ordinance recognizes this potential problem, but provides that no exception or waiver is generally available when two or more commonly-owned, contiguous lots can be aggregated to meet the City's minimum lot area standards.

This "merger" provision is typical of the manner in which municipalities address substandard, but commonly owned, lots. *See American Law of Zoning* § 9.67 at 325-26 ("Under [the exception for prior-owned substandard lots] an owner is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception"). *See also, e.g., Skelley v. Zoning Board of Review of the Town of South Kingston*, 569 A.2d 1054, 1056-57 (R.I. 1990) ("The concept of merger of contiguous nonconforming lots is gaining increased recognition"); *Asack v. Board of Appeals of Westwood*, 716 N.E.2d 135, 137 (Mass. App. 1999) ("adjoining parcels held in common ownership are generally considered one lot for zoning purposes"). Because the City's treatment of commonly owned substandard lots is prevalent, Petitioners' taking argument, *i.e.*, that development restrictions on commonly-owned contiguous lots are – categorically – a taking, calls into question the legislative choices of many other cities and towns and threatens to upset the settled expectations of both municipalities and their residents.

Petitioners' proposed usurpation of local zoning control is unnecessary to promote "fairness" because the current municipal distinctions are not unfair or irrational. The distinction between commonly-owned substandard parcels and separately-owned substandard parcels is not only well enshrined in zoning law, it has an obvious and rational purpose. Prohibiting development on a stand-alone parcel works a greater hardship on the parcel's owner, as the owner's choices are limited to sale of the parcel or purchase of a neighboring parcel. The potential hardship is not of the same kind or magnitude where the owner has the unilateral ability to combine parcels so as to meet the municipality's minimum

development requirements and, thereafter, the ability to develop the unified parcel as she sees fit. *See American Law of Zoning* § 9.67 at 327 ("The requirement that substandard lots be combined may be regarded as imposing no unnecessary hardship"). *See also, e.g., Sibley v. Inhabitants of the Town of Wells*, 462 A.2d 27, 30-31 (Me. 1983) (ownership of contiguous lots and ability to combine lots eliminates the hardship that a stand-alone owner would suffer); *Asack*, 716 N.E.2d at 137-38 (common owner of adjoining lots has the ability to minimize nonconformity); *Graham v. Itasca County Planning Commission*, 601 N.W.2d 461, 466 (Minn. App. 1999) (distinction between common and independently owned parcels is rational because common owners have greater ability to comply with underlying requirements); *Tekoa Construction, Inc. v. City of Seattle*, 781 P.2d 1324, 1328 (Wash. App. 1989) (common ownership distinction is rationally related to the city's legitimate interest in maintaining character of neighborhoods); *Klehr v. Zoning Board of Appeals of Village of Skokie*, 320 N.E.2d 498, 502 (Ill. App. 1974) (common ownership distinction upheld).

Unlike the stand-alone owner, the common owner has the ability to combine land and create a properly sized, conforming lot. The ability to aggregate and conform gives an owner increased flexibility to develop the conforming parcel. In this scenario, the unimproved lot is not an "economically idled" "appendage," *see* Pet. at 23, but an integral contributor to the value of the parcel as a whole. *See, e.g., Skelley*, 569 A.2d at 1058 (the merger of an unimproved lot with an improved lot increases the value of the improved lot and provides additional options for expansion of the primary home).[6] Indeed, with specific respect to Petitioners, the Illinois Court of Appeals upheld

[6] Under the City's Zoning Code, the increased area of the combined lots gives Petitioners the ability to construct a larger house than could be built on either divided lot, thereby providing added value.

the determination that the unified lot has increased 20 fold in value since the purchase in 1968. Pet. App. A-8. As this experience demonstrates, neither the general practice of requiring owners to merge non-conforming lots to meet minimum lot size standards, nor the specific application of the Ordinance to Petitioners' Property, results in fundamental unfairness that the Court need address.

In *Penn Central*, the Court stated that "in instances in which a state tribunal reasonably concluded that 'health, safety, morals, or general welfare' would be promoted by prohibiting particular uses of land, this Court has upheld land-use regulations that destroyed or adversely affected real property interests. [citations omitted]." 438 U.S. at 125, 98 S.Ct. at 2659. Here, state tribunals have repeatedly upheld the legitimacy of the kind of ordinance being challenged in the present case. Moreover, because this well-established land-use regulation does not prohibit development of any part of a property owner's substandard lot, it does not destroy or significantly adversely affect his property interests.

Despite insisting that the Court must decide how relevant parcels are to be determined, Petitioners offer no suggestion how this case might provide further guidance. By their erroneous argument that the absence of uniform aggregation or non-aggregation reflects a conflict among the lower courts, Petitioners implicitly reject a case-specific factual approach. Instead, Petitioners simply argue that the Court should overturn the established jurisprudence discussed above and hold unconstitutional zoning ordinances that preclude separation of contiguously owned substandard lots. Petitioners are in effect asking the Court to establish a *per se* rule that defines the relevant parcel as the property subject to the regulatory restriction – *i.e.*, in this case the substandard lot. But, as discussed above, this Court and federal circuit courts have already repeatedly and consistently rejected the notion of a *per se* rule defining the relevant parcel simply as the property subject to the regulatory

restriction – an approach that would make virtually every regulation a taking. *See, e.g., Tahoe*, 535 U.S. at 331 ("defining the property interest taken in terms of the very regulation being challenged is circular. * * * We have consistently rejected such an approach to the 'denominator' question"); *accord Loveladies*, 28 F.3d at 1181; *District Intown Properties*, 198 F.3d at 880, *et seq.* The Court having stated that principle several times, and the lower courts having followed that principle, it hardly needs to be repeated again, particularly when the court below properly followed that principle here.

In summary, the present case does not involve factual circumstances typical of those in which the courts must make difficult choices about what constitutes the relevant parcel for purposes of analyzing a takings claim. Consequently, this case does not provide a vehicle for the Court to further develop guidelines for the determination of the relevant parcel.

CONCLUSION

For the reasons stated above, the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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